No. 17-1717

In The
Supreme Court of the United States

THE AMERICAN LEGION, ET AL.,

Petitioners,

v.

AMERICAN HUMANIST ASSOCIATION, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner presents this case as one involving a display "incorporating religious symbolism." The monolith at issue, however, *is* a religious symbol: a 40-foot-tall Latin cross—*the* symbol of Christianity—towering over a county's busiest intersection.

The county owns, maintains, and prominently displays a massive concrete Christian cross in the middle of a highway median. Originally known as the "Calvary Cross," the cross was constructed on town property with the town's involvement. The dedication included prayers by Christian clergy, and the keynote speaker, a state official, proclaimed the cross to be "symbolic of Calvary." Every ceremony for the cross—including its fundraising drive, dedication, fiftieth anniversary, and rededication—featured Christian clergy-led prayers. Annual events held at the cross regularly feature Christian prayers as well. In 1985, the county spent $100,000 renovating the cross, followed by an official "Rededication Ceremony" to dedicate the cross to all war veterans. To date, the county has invested nearly a quarter-million dollars into the cross, which remains in critical condition. After evaluating the entire context and history of the cross under both *Lemon* and *Van Orden*, the Fourth Circuit ruled that it violates the Establishment Clause. The questions presented are:

1. Did the Fourth Circuit correctly determine that, in light of its size, history, and context, the government's Christian cross endorses Christianity, not only above all other faiths, but also to their exclusion?

QUESTIONS PRESENTED—Continued

2. Did the Fourth Circuit correctly determine, consistent with every other circuit decision involving a memorial cross, that a government's Christian cross war memorial, towering over a busy highway intersection, gives the impression to reasonable observers that Christian veterans are being honored to the exclusion of all others?

3. Did the Fourth Circuit correctly determine that the government's sizable funding, extensive renovation, and ongoing monitoring and maintenance of an enormous Christian symbol that dominates its surroundings, foster excessive entanglement with religion?

LISTINGS OF PARTIES TO PROCEEDINGS

The petition correctly states the names of all parties to this case.

RULE 29.6 STATEMENT

Respondent American Humanist Association is a nonprofit corporation, exempt from taxation under 26 U.S.C. § 501(c)(3). It has no parent or publicly held company owning ten percent or more of the corporation.

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JURISDICTION

The petition comes to this Court at an interlocutory stage, making the case unripe for this Court's review. No final judgment has been entered, and the district court has wide latitude on remand to find a solution that best accommodates conflicting concerns. (Pet.App.29a).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

"The First Amendment mandates government neutrality between religion and religion, and between religion and non-religion." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). The Fourth Circuit held that the government's monument violates this mandate because the "display aggrandizes the Latin cross in a manner that says to any reasonable observer that the Commission either places Christianity above other faiths, views being American and Christian as one in the same, or both." (Pet.App.28a).

"The cross is of course the preeminent symbol of Christianity." *Salazar v. Buono*, 559 U.S. 700, 725 (2010) (Alito, J., concurring). This Court has long recognized the power of symbolism as a "primitive but effective way of communicating ideas." *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 632 (1943). "[R]eligious symbols" convey "theological ones," as the "church speaks through the Cross." *Id.*

The Fourth Circuit understood that the proper question is not whether the Christian cross at issue can reasonably be perceived as a war memorial, but rather, whether it can reasonably be perceived as a war memorial that commemorates Christians to the exclusion of all others. (Pet.App.18a). Because the cross is "not a generic symbol of death" but rather "a *Christian* symbol of death that signifies or memorializes the death of a *Christian*," *American Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1161 (10th Cir. 2010), the government's use of a Christian symbol to honor "veterans sends a strong message of endorsement and exclusion." *Trunk v. City of San Diego*, 629 F.3d 1099, 1124-25 (9th Cir. 2011). It "suggests that the government is so connected to a particular religion that it treats that religion's symbolism as its own, as universal. To many non-Christian veterans, this claim of universality is alienating." *Id.*

Surely, a Christian cross war memorial does not commemorate, and necessarily excludes, the "3,500 Jewish soldiers [who] gave their lives for the United States in World War I." *Buono*, 559 U.S. at 726-27 (Alito, J., concurring). It also co-opts a sacred symbol for government military purposes, offending many Christians.[1]

There is no Circuit split. The uniformity in this segment of Establishment Clause jurisprudence is remarkable in its own right. There are at least thirty cases holding crosses unconstitutional and only three

[1] (Pet.App.18a,86a)(J.A.1443-45).

outliers, but those outliers are the product of highly unique facts rather than legal disagreement. And every Circuit that has addressed the constitutionality of a cross *memorial*, including the Fourth, Seventh, Ninth, and Tenth Circuits, soundly held that it violates the Establishment Clause.

The Fourth Circuit's decision—remanding to find a solution that either removes the government's imprimatur over this exclusively Christian symbol or makes the monument inclusive—"does not represent a hostility or indifference to religion but, instead, the respect for religious diversity that the Constitution requires." *County of Allegheny v. ACLU*, 492 U.S. 573, 612-13 (1989).

COUNTERSTATEMENT OF THE CASE

Petitioner American Legion's ("Legion") statement of the case is neither complete nor accurate. Respondents offer this counterstatement to address its more important omissions and errors.

I. Statement of Facts

The Maryland-National Capital Park and Planning Commission ("Commission") is a bi-county agency funded by Prince George's County, Maryland.[2]

[2] (Pet.App.3a;J.A.556).

The Commission owns, funds, maintains, and prominently displays a 40-foot-tall concrete Christian cross (the "Bladensburg Cross" or "Cross") towering over one of the busiest intersections in the county, situated on a median of a major three-way highway intersection in the Town of Bladensburg ("Town").[3] The Cross is the only monument on the traffic island and is the most prominent display in the Town.[4] The Cross was originally known as the "Calvary Cross," signifying the crucifixion of Jesus Christ.[5]

The Town approved the construction of a massive Christian cross on Town property in 1919.[6] Media described the proposed monument as a "mammoth cross, a likeness of the Cross of Calvary, as described in the Bible."[7] The "Calvary Cross Memorial" committee led fundraising efforts.[8] Donors signed a pledge stating that they "trust[ed] in God, the Supreme Ruler of the universe," and pledged to "'one god, one country and one flag.'"[9] The Cross's designer, John Earley, was chosen because of his recent work on a Catholic shrine.[10]

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[3] (Pet.App.3a,5a-6a,8a)(App.1-3)(J.A.315)(J.A.360-62)(J.A.425)(J.A.579)(J.A.1098)(J.A.1132)(J.A.1584).

[4] (Pet.App.22a,26a)(App.1-4)(J.A.37)(J.A.44)(J.A.1753).

[5] (Pet.App.4a)(J.A.288-89)(J.A.1114-15)(J.A.1118-20)(J.A.1130-32)(J.A.1876).

[6] (Pet.App.4a,53a-55a)(J.A.78)(J.A.1086)(J.A.1115-18)(J.A.1450)(J.A.1733)(J.A.1992-94).

[7] (Pet.App.4a)(J.A.1115).

[8] (J.A.1118).

[9] (Pet.App.3a-4a)(J.A.36).

[10] (J.A.628)(J.A.2486-87)(J.A.3312-13).

Christian pastor-led prayers were delivered at the Legion's fundraising drive for the Cross in 1922.[11] The Legion later held memorial services around the unfinished Cross, at which a Christian pastor led prayer, and those in attendance sang the Christian hymn "Nearer My God to Thee."[12]

Government officials and Christian clergy led the Cross's dedication ceremony in 1925.[13] The keynote speaker, Maryland Representative Stephen Gambrill, proclaimed: "by the token of this cross, symbolic of Calvary, let us keep fresh the memory of our boys who died for a righteous cause."[14] A Roman Catholic priest and a Baptist minister delivered prayers.[15]

In the decades following its dedication, annual services held at the Cross included Christian clergy-led prayers and involvement by prominent government officials.[16] Frank Mountford, a leading evangelist, reportedly held three "Sunday services" at the Cross in 1931.[17]

At the Cross's "50th anniversary," the featured speaker was a Christian chaplain, who also delivered

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[11] (Pet.App.4a)(J.A.2092).

[12] (Pet.App.4a)(J.A.2095-96).

[13] (Pet.App.5a)(J.A.2508).

[14] (Pet.App.56a)(J.A.1130-34)(J.A.2508).

[15] (Pet.App.5a)(J.A.212)(J.A.1134)(J.A.2508).

[16] (J.A.1225-32).

[17] (Pet.App.5a)(J.A.1228).

the closing prayer, and the Rector of St. Luke's Episcopal Church delivered the opening prayer.[18]

In 1984, the Town hosted a ceremony at the Cross featuring two prayers by Father Chimiak of St. Matthias Catholic Church.[19]

In 1985, the Commission spent $100,000 on substantial renovations to the Cross, followed by an elaborate "Rededication" ceremony, co-hosted by the Town, to rededicate the Cross to veterans of "all wars."[20] The Commission invited Father Chimiak to deliver prayers, and sent a letter thanking him "for his contributions to our programs and trust we may assimilate this relationship again."[21]

Since then, the Town and the Legion have co-sponsored annual services at the Cross that feature Christian-themed prayers.[22] For instance, the May 2004 service included an "Opening Prayer" and "Closing Prayer" by "Pastor Curtis Robinson" of the "Faith-Deliverance-Soul Saving Station."[23]

The Cross was constructed in isolation, but several much smaller displays, mostly of recent vintage, have

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[18] (J.A.1262-70)(J.A.1998).

[19] (J.A.1350-51).

[20] (Pet.App.5a)(J.A.137-38)(J.A.360-65)(J.A.375)(J.A.1108-10)(J.A.1753)(J.A.2484).

[21] (J.A.362).

[22] (Pet.App.5a,23a)(J.A.840)(J.A.870-91)(J.A.1803-12)(J.A.1847-50)(J.A.1282-1343).

[23] (J.A.1334-35).

been added to a separate area across the street.[24] As the Fourth Circuit observed, the "Cross is by far the most prominent monument in the area, conspicuously displayed at a busy intersection, standing four stories tall, and overshadowing the other monuments." (Pet.App.22a).

The Cross is "rapidly deteriorating" and in dire condition.[25] In 2008, the Commission set aside $100,000 for renovations.[26] But officials recently indicated that the Cross is beyond repair, even expressing relief at the prospect of the Cross crumbling down on its own.[27]

The court's decision leaves the historic memorial consisting of the pedestal, plaque, and inscriptions intact. (Pet.5). It does not even require the "destruction" or removal of the Cross. (Pet.17). *See* (Pet.App.29a).

II. Petitioner's Errors and Omissions

A. Government Involvement

The Legion asserts that "the Memorial's private builders chose, decades before any government became involved . . . a cross." (Pet.2, 13). On the contrary, construction commenced in 1919 on land "owned by the Town" with the approval of the Town's commissioners.[28]

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[24] (Pet.App.7a)(App.4-10)(J.A.66-67)(J.A.2024).

[25] (J.A.597-99)(J.A.1159-60)(J.A.1574)(J.A.1580-81)(J.A.1648-64) (J.A.1668-75)(J.A.1678-79)(J.A.1683-87)(J.A.2158)(J.A.2488-2501).

[26] (Pet.App.5a)(J.A.562-64)(J.A.1660)(J.A.1698)(J.A.1704).

[27] (J.A.1668)(J.A.1672)(J.A.2158).

[28] (Pet.App.4a,53a-54a)(J.A.78)(J.A.1086)(J.A.1393-94)(J.A.1450).

By 1922, the Cross was erected but unfinished.[29] The Town resolved to temporarily give the Legion the "care" of the land for the Cross's "completion," but it is unclear whether the property was legally deeded.[30] Regardless, in 1935, the State believed it was the owner and in 1956, "the Circuit Court ruled that the State of Maryland was the owner."[31] In 1960, the Commission acquired the Cross from the State Roads Commission after the highway project was completed, for the purposes of "the future repair and maintenance of the monument."[32]

The government was also actively involved in the groundbreaking and dedication ceremonies. The Secretary of the Navy "was the primary speaker" at the groundbreaking and other "speeches were given by local officials."[33] The keynote speaker at the dedication was a state representative, and "local officials and figures delivered remarks."[34] The Legion also ignores the fact that the Commission explicitly "Rededicated" the Cross in 1985 to all veterans.[35]

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[29] (Pet.App.54a-55a)(J.A.78)(J.A.345)(J.A.1992)(J.A.2095).

[30] (Pet.App.54a-55a)(J.A.78)(J.A.2970).

[31] (Pet.App.56a-57a)(J.A.1086)(J.A.1095).

[32] (J.A.3219)(Dist. Ct. Doc. 86 at 5)(J.A.93-94)(J.A.1086)(J.A.2970-71).

[33] (Pet.App.54a-56a)(J.A.1120)(J.A.1970)(J.A.1991).

[34] (Pet.App.54a-56a)(J.A.1130-34)(J.A.2508).

[35] (J.A.360-65)(J.A.375)(J.A.1753).

B. Religious Motive, Usage, and History

The Legion claims it "is undisputed" that the Committee "chose to use a cross specifically to mirror the soldiers' battlefield graves." (Pet.5, 11, 30). This is disputed and sharply contradicted by the record. Instead, the Committee intended to construct a "Calvary" cross, "as described in the Bible."[36] The Cross's Christian character, and its likeness to "Calvary," was stressed at its dedication.[37]

The Legion also omits any mention of the Cross's famed designer, John Earley, known for Christian iconography.[38] In 1919, Earley finished the interior of the Shrine of the Sacred Heart, a Roman Catholic parish. The "Cross borrowed from the mosaic and thin-panel methods developed at the Shrine . . . [c]onstructed concurrently with their string of church commissions."[39]

The Cross's sheer appearance undermines the Legion's argument, as it looks nothing like the "cross-shaped gravemarkers" in overseas cemeteries, which are small, thin, plain white Latin crosses.[40] Bladensburg Cross is a wide, 40-foot-tall, "light brown with a reddish brown border," concrete "Celtic-styled Latin cross," adorned with a "U.S." star motif.[41]

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[36] (Pet.App.4a)(J.A.1114-15)(J.A.1118-20)(J.A.1130-32).

[37] (Pet.App.56a)(J.A.213)(J.A.288)(J.A.1131).

[38] (J.A.2483)(J.A.2486)(J.A.3310-13).

[39] (J.A.2486-87).

[40] (J.A.1894)(J.A.1900)(J.A.3356).

[41] (Pet.5)(J.A.1099)(J.A.1134)(J.A.1994)(J.A.1587).

The Legion focuses instead on a single quote by one woman a year after the groundbreaking as the exclusive evidence of the Cross's purpose. (Pet.5-6) ("I feel that our memorial cross is, in a way, his grave stone."). But a week after the Cross's groundbreaking, a secular World War I memorial was unveiled at the nearby county courthouse, bearing a plaque with the very same names as those on the Cross.[42] According to government records, "many citizens, aware the county already had a war memorial, deemed it unnecessary to support further attempts to complete" the Cross.[43] Likewise, only three soldiers named on the Cross are buried overseas.[44] Most "mourners were able to visit the grave of their fallen son or husband at a nearby private graveyard or national cemetery."[45]

Of course, Bladensburg Cross would be no less religious even if it were designed to mirror cross gravemarkers. (Pet.App.18a). The Legion seizes upon Dr. Piehler's observation that crosses "developed into a central symbol of the American overseas cemetery" (Pet.6), but omits his passage indicating that the cross remained religious:

> The World War I memorials . . . witnessed an increased use of *religious* imagery—for instance, chapels were built in each of the overseas cemeteries and the Cross became

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[42] (J.A.206-08)(J.A.295)(J.A.1992); *Prince George's County Courthouse WWI Memorial* (July 2009), https://perma.cc/FE9J-AEJL.

[43] (J.A.1992).

[44] (J.A.294-96).

[45] (J.A.296).

> the principal grave marker in them (*with a Star of David gravestone used for Jewish soldiers*).[46]

C. Recent Monuments

The Legion claims that the most recent of the several distant displays (added *during* appeal[47]) is "as tall" as the Cross, referring to two "38-foot-tall soldier statues." (Pet.8). But the soldiers are thin 5.5-foot-tall cutouts situated atop poles, easily mistakable for the adjacent telephone poles.[48]

Also deceiving is the Legion's assertion that the "Bladensburg community" added these displays. (Pet.7). The Cross stood alone in the area for twenty years until *the Legion* installed a World War II scroll, one-third the Cross's size, in a separate area across the street.[49] Sixty years after the Cross was erected, *the Town* added a six-foot-tall Korea and Vietnam memorial near the scroll.[50] In 2006, *the county* installed a one-foot-tall 9/11 sidewalk memorial on the other side of the scroll.[51] In 2014, *the Town* installed a War of 1812 monument one-half mile away, and one-half the Cross's

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[46] (J.A.2239) (emphasis added). *See also* (J.A.2280-97).

[47] (J.A.1697).

[48] *Google Maps* (Sept. 2017), https://goo.gl/maps/QXupqkdCYGy; https://goo.gl/maps/cRroAB86QW72.

[49] (App.4)(App.9)(J.A.66).

[50] (App.4)(App.7-8)(J.A.30)(J.A.44)(J.A.1973).

[51] (App.4-6); *Prince George's County Fire/EMS Department* (Sept. 2016), https://perma.cc/7JZU-3ZA9.

size.[52] And as the appeal was pending, *the Commission* added the soldier poles.[53]

D. Community Reception

The Legion's argument that the record contains no "indication the community interpreted the Memorial's message to be religious" (Pet.7) is unfounded. The record is replete with evidence that the public has perceived this Cross as a religious symbol throughout its history.[54]

In 2012, Reverend Brian Adams of Mount Rainier Christian Church published an article stating that the Bladensburg "Cross is there as a Christian symbol" and "that using the cross as a symbol of what our military did is blasphemy."[55] Another local wrote: "I am an atheist who has lived in Hyattsville for 15 years. I was always bothered by the giant cross."[56] A Jewish resident wrote: "I moved to PG County in June and live 1.6 miles west of the Bladensburg Cross. . . . I am appalled to learn that the cross is owned by the State of Maryland."[57] Jason Torpy, a Humanist veteran, testified: "My military service, as well as the service of other

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[52] (Pet.App.7a, 58a)(J.A.707-08)(J.A.2024).

[53] (Pet.App.58a)(J.A.1697).

[54] (J.A.1044-46)(J.A.1082-84)(J.A.1115-20)(J.A.1130-32)(J.A.1228) (J.A.1235)(J.A.1238)(J.A.1387-1445)(J.A.1452-55)(J.A.3222-83) (J.A.3408-12).

[55] (J.A.1443-45).

[56] (J.A.1437).

[57] (J.A.1438); *see also* (J.A.1439).

non-Christians . . . is excluded and disrespected when a Christian cross is presented as a public memorial."[58]

Numerous avowed Christians expressed the sentiment that the Cross should remain *because* of its religious meaning.[59] Indeed, even the Legion itself wrote that "[r]eligious imagery [on veterans' memorials] serves to acknowledge that most people served by the memorial rest their eternal hopes on God or some religious sentiment."[60]

REASONS FOR DENYING THE WRIT

There are four reasons to deny certiorari. First, the interlocutory posture makes this case unripe for this Court's review. Second, there is no Circuit split. Third, there is no conflict with this Court's precedents. Fourth, the Fourth Circuit's ruling is highly fact-specific and does not threaten any other monument. Sup. Ct. R. 10.

I. The case is unripe for this Court's review.

Because the Fourth Circuit remanded, no final judgment has been rendered, and it remains unclear precisely what action the government must take, this case is not ripe for this Court's review. *See Locomotive Firemen v. Bangor & Aroostook R. Co.*, 389 U.S. 327,

[58] (J.A.1045); *see also* (J.A.1082-84)(J.A.3261)(J.A.3269).

[59] (J.A.1387-1435)(J.A.1449-55).

[60] (J.A.1771); *see also* (J.A.1459)(Oral Arg. 27:45-32:35).

328 (1967) (per curiam). The Fourth Circuit emphasized: "Upon remand, the parties should note that this opinion does not presuppose any particular result . . . [R]ather, the parties are free to explore alternative arrangements that would not offend the Constitution." (Pet.App.29a).

In *Mount Soledad Memorial Association v. Trunk*, Justice Alito explained, as applicable here:

> The current petitions come to us in an interlocutory posture. The Court of Appeals remanded the case to the District Court to fashion an appropriate remedy, and, in doing so, the Court of Appeals emphasized that its decision "d[id] not mean that the Memorial could not be modified to pass constitutional muster [or] that no cross can be part of [the Memorial]." [ ]. Because no final judgment has been rendered and it remains unclear precisely what action the Federal Government will be required to take, I agree with the Court's decision to deny the petitions for certiorari.

567 U.S. 944, 945-46 (2012) (Alito, J., concurring in the denial of certiorari) (citations omitted).

II. There is no Circuit split.

A. Every Circuit that has addressed the constitutionality of a cross memorial has held that it violates the Establishment Clause.

There is no Circuit split. Quite the opposite, there is overwhelming consensus that government crosses violate the Establishment Clause. Including the Fourth Circuit's decision, there are at least *thirty* federal cases—including by the Third, Fourth, Seventh, Ninth, Tenth, and Eleventh Circuits—holding crosses unconstitutional, *ten* of which involved memorials specifically (*):

1. *Trunk*, 629 F.3d 1099 (9th Cir. 2011)*
2. *Duncan*, 616 F.3d 1145 (10th Cir. 2010)*
3. *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004)*
4. *Carpenter v. San Francisco*, 93 F.3d 627 (9th Cir. 1996)
5. *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617 (9th Cir. 1996)*
6. *Robinson v. City of Edmond*, 68 F.3d 1226 (10th Cir. 1995)
7. *Ellis v. La Mesa*, 990 F.2d 1518 (9th Cir. 1993)*
8. *Gonzales v. North Township Lake County*, 4 F.3d 1412 (7th Cir. 1993)*

9. *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991)

10. *ACLU v. City of St. Charles*, 794 F.2d 265 (7th Cir. 1986)

11. *Friedman v. Board of County Commissioners*, 781 F.2d 777 (10th Cir. 1985) (en banc)

12. *ACLU v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983)

13. *Gilfillan v. Philadelphia*, 637 F.2d 924 (3d Cir. 1980)

14. *Granzeier v. Middleton*, 955 F. Supp. 741 (E.D. Ky. 1997), *aff'd*, 173 F.3d 568 (6th Cir. 1999)

15. *Lions Club of Albany v. City of Albany*, 2018 U.S. Dist. LEXIS 102139 (N.D. Cal. June 15, 2018)

16. *Kondrat'yev v. City of Pensacola*, 2017 U.S. Dist. LEXIS 203588 (N.D. Fla. June 19, 2017), *pending appeal*, No. 17-13025 (11th Cir. 2018)

17. *Freedom from Religion Foundation v. County of Lehigh*, 2017 U.S. Dist. LEXIS 160234 (E.D. Pa. Sep. 28, 2017), *pending appeal*, No. 17-3581 (3d Cir. 2018)

18. *Davies v. County of Los Angeles*, 177 F. Supp. 3d 1194 (C.D. Cal. 2016)

19. *American Humanist Association v. Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180 (C.D. Cal. 2014)*

20. *Cabral v. City of Evansville*, 958 F. Supp. 2d 1018 (S.D. Ind. 2013), *dismissed on other grounds*, 759 F.3d 639 (7th Cir. 2014)

21. *Summers v. Adams*, 669 F. Supp. 2d 637 (D.S.C. 2009)

22. *American Atheists, Inc. v. City of Starke*, 2007 U.S. Dist. LEXIS 19512 (M.D. Fla. 2007)

23. *ACLU v. City of Stow*, 29 F. Supp. 2d 845 (N.D. Ohio 1998)

24. *Joki v. Board of Education*, 745 F. Supp. 823 (N.D.N.Y 1990)

25. *Mendelson v. City of St. Cloud*, 719 F. Supp. 1065 (M.D. Fla. 1989)

26. *Jewish War Veterans v. United States*, 695 F. Supp. 3 (D.D.C. 1988)*

27. *ACLU v. Mississippi State General Services Administration*, 652 F. Supp. 380 (S.D. Miss. 1987)

28. *Libin v. Greenwich*, 625 F. Supp. 393 (D. Conn. 1985)

29. *Greater Houston Chapter ACLU v. Eckels*, 589 F. Supp. 222 (S.D. Tex. 1984), *reh'g denied*, 763 F.2d 180 (5th Cir. 1985)*

The Legion cites only *three* exceptions (Pet.15-16), but there is no indication that the Fourth Circuit would have decided those cases differently, *infra* at II-B.

Critically, every court that has determined the constitutionality of a cross *memorial*, including the

Fourth, Seventh, Ninth, and Tenth Circuits, *supra*, ruled that the cross violates the Establishment Clause. There is *no* contrary authority.

Aware of this tremendous uniformity, the Legion resorts to arguing instead that: "No other Court of Appeals has held that a longstanding veterans memorial, created to be a veterans memorial, and consistently used and regarded by the community as a veterans memorial, violates the Establishment Clause." (Pet.2). This is false. In *Eugene*, the Ninth Circuit held that a concrete war memorial cross erected by American Legion in 1964, without the city's permission, violated the Establishment Clause. 93 F.3d at 617-20 n.5. Memorial ceremonies were "conducted by the American Legion" for years. *Id.* at 625 n.9 (O'Scannlain, J., concurring). Additionally, a "plaque on the cross clearly show[ed] its status as a war memorial as d[id] the original City Charter provision." *Id.* at 625-26.

The Legion's argument is also irrelevant because a "memorial cross" only "memorializes the death of a *Christian*." *Duncan*, 616 F.3d at 1161. The Ninth Circuit in *Buono*, citing Judge O'Scannlain's concurrence, *supra*, recognized that despite a sign designating the cross as a war memorial, and "indeed perhaps *because of it*," observers could reasonably "'believe that the City had chosen to honor only Christian veterans.'" 371 F.3d at 549 n.5 (emphasis added). Even this Court has cited *Eckels* with approval for the notion that a "war memorial containing crosses and a Star of David unconstitutionally favored Christianity and Judaism" and discriminated against patriotic non-Christians

who died for our country. *Allegheny*, 492 U.S. at 615 n.61 (citing 589 F. Supp. 222). *See also Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, at *40 (a war memorial cross has "the effect of memorializing only the Christian deceased."); *Jewish War Veterans*, 695 F. Supp. at 14 (a government war memorial cross makes "a message of endorsement likely if not unavoidable.").

B. The three outliers are attributable to exceptionally unique facts, not legal disagreement.

In *American Atheists, Inc. v. Port Authority*, the Second Circuit upheld "a particular artifact recovered from World Trade Center debris, a column and crossbeam" displayed in a September 11 museum. 760 F.3d 227, 232 (2d Cir. 2014). The rubble was donated along with "more than 10,000 artifacts." *Id.* at 234-36. The court concluded a reasonable observer would view the effect of it, "amid hundreds of other (mostly secular) artifacts, to be ensuring historical completeness." *Id.* at 236, 243-44. Bladensburg Cross is not an *artifact* in a museum. *See* (Pet.App.90a). It is an intentionally designed "Calvary Cross," installed in isolation on a traffic island.

The other two outliers involved small crosses *integrated* into government seals with highly unique "localized secular meanings." *Trunk*, 629 F.3d at 1111. *See Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1035 (10th Cir. 2008) (city's name literally means "The Crosses" reflecting "unique history" of city's secular

founding); *Murray v. Austin*, 947 F.2d 147, 149, 155 (5th Cir. 1991) (the seal simply "incorporated . . . the family coat of arms of Stephen F. Austin, the 'Father of Texas' and the person after whom the City is named").

While the Legion contends that "[t]he Fourth Circuit's decision cannot be reconciled with these decisions," the Tenth Circuit effortlessly reconciled *Weinbaum* in holding memorial crosses unconstitutional in *Duncan*, 616 F.3d at 1152-62. The Ninth Circuit also reconciled *Weinbaum* and *Murray* in holding a war memorial cross unconstitutional in *Trunk*, 629 F.3d at 1111. Even the Legion argued that seal cases "involve very different factual circumstances, and are thus of limited use." (4th Cir. Doc. 34, at 70).

The Legion believes that *Weinbaum* is indistinguishable because the Cross "has the shape it does specifically to reflect the cross-shaped gravemarkers." (Pet.17). This is unsubstantiated, *supra*, and irrelevant, as the Tenth Circuit made clear that "while the cross may be a common symbol used in markers and memorials, there is no evidence that it is widely accepted as a secular symbol." *Duncan*, 616 F.3d at 1161.

C. The Legion attempts to manufacture a split by relying solely on Ten Commandments cases and misstating the Fourth and Tenth Circuits' reasonable observer analyses.

Having shown no actual Circuit split, the Legion creates an illusory one by asserting that "the courts of appeals disagree even over what test to apply to passive displays that include religious symbols." (Pet.22). There is *no* disagreement, however, over the test applicable to *cross* displays. With remarkable consistency, federal courts have uniformly adhered to *Lemon* in cross cases. The Legion failed to cite a single cross case that eschewed *Lemon*.

The only "conflict" the Legion presented surrounds Ten Commandments cases post-*Van Orden v. Perry*, 545 U.S. 677 (2005) (Pet.22-23). But of the thirteen *cross* cases decided after *Van Orden*, every court adhered to *Lemon*, including the Second, Fourth, Ninth, and Tenth Circuits, and district courts within the Third (*Lehigh*), Fourth (*Summers*), Seventh (*Cabral*), Ninth (*Lion's Club*, *Davies*, *Lake Elsinore*), and Eleventh (*Pensacola*, *Starke*) Circuits. (See list, *supra*). *See also Trunk*, 629 F.3d at 1107 ("both cases guide us to the same result.").

The Legion then claims "there is significant disagreement over what the hypothetical reasonable observer should know." (Pet.23). It cites *Weinbaum* for the notion that in some cases, she "is presumed to know far more than most actual members of a given

community." (Pet.23) It then cites *Duncan* and the Fourth Circuit's decision *exclusively* for its contention that "for many courts, the reasonable observer possesses only the knowledge of an average passer-by." (Pet.24).

To the contrary, in *Duncan*, the Tenth Circuit declared that the "reasonable observer 'is presumed to know far more than most actual members of a given community.'" 616 F.3d at 1159 (citation omitted). The court *did not* confine its analysis to a passing motorist. *Id.* at 1159-64. It noted that although one would be unlikely to notice the plaque containing detailed "biographical information," it would "not diminish the governmental message endorsing Christianity" either way. *Id.* at 1160-61. The state argued that the plaque conveyed the message "that these crosses are designed as memorials." *Id.* The court "agree[d] that a reasonable observer would recognize these memorial crosses as symbols of death." *Id.* It just did not "agree that this nullifies their religious sectarian content." *Id.*

The Fourth Circuit similarly undertook a "detailed factual analysis of the Cross, including its meaning, history, and secularizing elements." (Pet.App.17a). And it specifically considered numerous facts that would be unknown to an "average passer-by," including the fact that "the Cross is dedicated to 49 World War I veterans," "the private organizers pledged devotion to faith in God," and that "Christian-only religious activities have taken place at the Cross." (Pet.App.25a).

D. No Circuit split was created by the Fourth Circuit's holding that the government's funding, pervasive monitoring, and ongoing maintenance and renovation of a gigantic Christian cross fosters excessive entanglement with religion.

The Legion argues that the decision "created a new circuit split over whether a government's expenditure of funds for routine maintenance of a passive display that includes a religious symbol, without more, can violate *Lemon*'s 'excessive entanglement' prong," citing *Brooks v. City of Oak Ridge*, 222 F.3d 259, 265-66 (6th Cir. 2000). (Pet.24-25). This is highly misleading.

First, the expenditures are *not* limited to "routine maintenance." In 1985, the Commission spent $100,000 on significant renovations.[61] It spent an additional $17,000 on "routine maintenance."[62] In 2008, the Commission allocated another $100,000 for repairs because the Cross is "rapidly deteriorating," posing a safety hazard.[63] A 2015 "crack survey" proves extensive work is needed.[64] *Cf. Lynch v. Donnelly*, 465 U.S. 668, 684 (1984) (no entanglement where "[n]o expenditures for maintenance of the crèche have been necessary").

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[61] (Pet.App.5a,60a)(J.A.360)(J.A.1108-10)(J.A.2484).

[62] (Pet.App.60a)(J.A.138)(J.A.567)(J.A.1689).

[63] (Pet.App.5a)(J.A.562-64)(J.A.1648-50)(J.A.1660)(J.A.1668)(J.A.1672)(J.A.1687)(J.A.1698)(J.A.2158).

[64] (J.A.2479-2502).

This $217,000 total *excludes* government funds inevitably spent on the numerous Town and Commission events held at the Cross.[65] That the Commission invited a Catholic priest to deliver prayers at the rededication, and expressed a desire to "assimilate this relationship again" (J.A.362) alone fosters entanglement. *See Gilfillan*, 637 F.2d at 931 (the "relationship between the City and the Archdiocese [for the event] constituted entanglement").

Second, the Bladensburg Cross is not a "display that *includes* a religious symbol." (Pet.24) (emphasis added). The *display itself* is a religious symbol and "*the* Christian symbol."[66] And the court found excessive entanglement precisely "because the Commission is displaying the hallmark symbol of Christianity in a manner that dominates its surroundings and not only overwhelms all other monuments at the park, but also excludes all other religious tenets." (Pet.App.28a). *Brooks* is therefore inapposite because the Sixth Circuit found, by contrast, that the "Friendship Bell display" did not convey the message that the government "endorses Buddhism." 222 F.3d at 265-66.

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[65] (Pet.App.59a)(J.A.1262-1353).

[66] (Oral Arg. 31:05-31:32).

III. The Fourth Circuit properly applied this Court's precedents and reached the correct result.

A. Reversal would create deep tensions with this Court's jurisprudence.

"'The fullest realization of true religious liberty requires that government . . . effect no favoritism among sects or between religion and nonreligion.'" *Allegheny*, 492 U.S. at 593 (citation omitted). In religious display cases, the question is whether the display "has the effect of endorsing or disapproving religious beliefs." *Id.* at 597. "That test requires the hypothetical construct of an objective observer who knows all of the pertinent facts and circumstances surrounding the symbol and its placement." *Buono*, 559 U.S. at 721.

Applying this test in *Allegheny*, the Court held that a privately donated crèche, temporarily displayed in a courthouse, unconstitutionally endorsed "a patently Christian message," despite a disclaimer and other secular displays in the courthouse. 492 U.S. at 597-98, 601-02, n.48.

The Commission's Cross sends a much stronger message of Christian favoritism than the small symbol of a secularized holiday in *Allegheny*. *Id.* at 599, 603 (distinguishing "a specifically Christian symbol" from "more general religious references"). Christmas is celebrated by "many non-Christians" but "the Latin cross has not lost its Christian identity." *St. Charles*, 794 F.2d at 271. And as a permanent display, the Bladensburg Cross "brings together church and state . . . even

more ardently than the unconstitutional crèche." *Harris*, 927 F.2d at 1412. *See also Eckels*, 589 F. Supp. at 235 (contrasting war memorial cross with a "temporary governmental celebration of a religious holiday that has acquired some secular flavor").

Significantly, in *Allegheny*, Justice Kennedy had no "doubt" that the Establishment "Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall." 492 U.S. at 661 (concurring and dissenting in part). He explained that "such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion." *Id.* (citing *Friedman*, 781 F.2d 777 (Latin cross on official county seal), *Rabun*, 698 F.2d 1098 (cross erected in public park), and *Lowe v. Eugene*, 254 Or. 518 (1969) (same)).

B. The Fourth Circuit scrupulously evaluated the Cross's entire history and context in accord with this Court's precedents.

The Legion argues that the Fourth Circuit focused solely on the "religious meaning of crosses generally rather than the clear secular purpose, history, and content of the Memorial itself," resulting in a "*per se* prohibition against crosses." (Pet.13-14). "This is not accurate." (Pet.App.24a). The court "carefully considered" the "entire context and history of the Cross, spanning from its origin to the present." (Pet.App.24a-25a). *See* (Pet.App.20a-27a). The court found that these

"factors collectively weigh in favor of concluding that the Cross endorses Christianity—not only above all other faiths, but also to their exclusion." (Pet.App.26a).

It is evident that the Legion merely disagrees with the Fourth Circuit's conclusion that "the historical meaning and physical setting of the Cross overshadows its secular elements." (Pet.App.24a). Yet the Legion fails to show otherwise.

First, the Legion claims that the reasonable observer would know "that the Commission came to own the Memorial only because of traffic safety concerns," has "never expressed any religious motivation," and that the "private builders used a cross to mirror the gravemarkers." (Pet.30). The reasonable observer, however, would only be aware of facts, not fiction. To reiterate:

1. The Cross was originally owned by the Town, then taken over by the State Roads Commission for highway expansion, and then transferred to the Commission for the sole purpose of "future repair and maintenance."[67] The Commission admitted: "After completing the highway project, the Roads Commission determined that there was excess land remaining that was no longer needed at the Memorial."[68] *See Trunk*, 629 F.3d at 1119 n.19 ("simply because the Cross was transferred from the local government to the federal

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[67] (Pet.App.4a,53a-54a,57a)(J.A.93-94)(J.A.3219).

[68] (Dist. Ct. Doc. 86 at 5).

government does not wipe out the history of the site" or "divest the Cross of its Christian symbolism").

2. The government expressed religious motivation for the Cross at its dedication ceremony.[69]

3. The Commission expressed religious motivation for the Cross's "Rededication" by inviting a Catholic priest to deliver prayers.[70]

4. A cross was chosen to represent "Calvary," and the "builder" intended the Cross to mirror a local Catholic shrine.[71]

Second, the Legion asserts that "the community has used the Memorial as a site for hundreds of events honoring veterans." (Pet.30). The Fourth Circuit *agreed*, but noted that these services include "prayer" and "[n]othing in the record indicates that any of these services represented any faith other than Christianity."[72] A reasonable observer would also know that the "organizers pledged devotion to faith in God."[73] The Cross thus "has a long history of religious use and symbolism that is inextricably intertwined with its commemorative message." *Trunk*, 629 F.3d at 1118. *See Allegheny*, 492 U.S. at 599 ("Nor does the fact that the crèche was the setting for the county's annual

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[69] (Pet.App.56a)(J.A.213)(J.A.1131-32)(J.A.2508).

[70] (J.A.362-64).

[71] (J.A.288)(J.A.1115-20)(J.A.2508)(J.A.2486-87)(J.A.3312).

[72] (Pet.App.5a); *e.g.* (J.A.816)(J.A.830)(J.A.836-41)(J.A.870-91)(J.A.1847-50)(J.A.1282-1353).

[73] (Pet.App.25a)(J.A.36).

Christmas-carol program," dedicated to "world peace and families of prisoners of war" diminish "its religious meaning . . . [T]hose carols were more likely to augment the religious quality of the scene than to secularize it."). Prayer does not lose its religious character when it occurs in conjunction with secular activities. *E.g.*, *Lee v. Weisman*, 505 U.S. 577, 594 (1992).

Third, the Legion states that "the community has responded to the Memorial by adding other secular commemorative monuments." (Pet.30). Again, the *government* added these smaller monuments, *supra*, and besides, the Fourth Circuit found that the reasonable observer "could not help but note that the Cross is the most prominent monument in the Park." (Pet.App.26a). If anything, the "Cross's central position" among these newer smaller displays "gives it a symbolic value that intensifies the Memorial's sectarian message." *Trunk*, 629 F.3d at 1123-24.

Fourth, the Legion claims that the "observer would be aware of the various secular elements on the Memorial that explain its message—namely, the large plaque that identifies it as a memorial honoring 49 men who died in WWI, the military-themed words on the base, and the American Legion's symbol." (Pet.31). The Fourth Circuit agreed "a reasonable observer would know that the Cross is dedicated to 49 World War I veterans." (Pet.App.25a). It just disagreed that this makes the cross *secular*. (Pet.App.18a-19a). In "the memorial context, a Latin cross serves not simply as a generic symbol of death, but rather a Christian symbol of the death of Jesus Christ." (Pet.App.18a). The Cross

certainly does not commemorate the "3,500 Jewish soldiers [who] gave their lives for the United States in World War I." *Buono*, 559 U.S. at 726 (Alito, J., concurring).[74]

The Fourth Circuit also found that "the sectarian elements easily overwhelm the secular ones." (Pet.App.22a). Nor could the court ignore "the American Legion's affiliation with Christianity." (Pet.App.23a).[75] *See Allegheny*, 492 U.S. at 600 ("the sign simply demonstrates that the government is endorsing the religious message of that organization"). And the "military-themed words" on the base only fortify the government's endorsement of this religious symbol. *See Books v. City of Elkhart*, 235 F.3d 292, 307 (7th Cir. 2000) ("the placement of the American Eagle gripping the national colors at the top of the monument hardly detracts from the message of endorsement; rather, it specifically links religion . . . and civil government").

Finally, the Legion argues that anyone who views this Cross as a Christian memorial is an "uninformed observer" who "misinterprets the message." (Pet.36). This defies common sense. If the intended message were to honor Jewish or Sikh soldiers, a Christian cross would not be used. The Legion admitted this Cross was never intended to commemorate Jewish

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[74] (J.A.2280-97).

[75] (J.A.873)(J.A.1046-48)(J.A.1205)(J.A.1469-70)(J.A.2095)(J.A.2104).

soldiers,[76] despite substantial Jewish communities in Maryland and D.C.[77] Furthermore, in 1985 the Commission officially "Rededicated" the Cross to *all* war veterans, spending $100,000 on significant renovations, yet never attempted to make the monument inclusive and reflective of "the religious diversity of the American soldiers who gave their lives" in service. *Buono*, 559 U.S. at 726-27 (Alito, J., concurring). Judge Wynn captured the Legion's argument perfectly when he announced:

> I actually think it's kind of offensive to think that saying a cross is just a secular symbol of something else. . . . But I got your point. . . . You want to have the cross up there, but you want everybody now to not look at it as being anything other than, "that's just an old cross, it doesn't mean anything. . . . It has nothing to do with Jesus Christ, it has nothing to do with crucifixion, has nothing to do with Christianity." Do you really think your clients believe that? Or want that to happen?[78]

The Legion's counsel suggested they did not, but rejoined: "My clients are not the reasonable observer."[79]

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[76] (Oral Arg. 23:05-23:37)(J.A.164)(J.A.771).

[77] (J.A.212).

[78] (Oral Arg. 31:35-32:25).

[79] (Oral Arg. 32:24-32:32).

C. The Fourth Circuit's narrow fact-specific decision does not threaten any other monument.

The Legion's argument that the "decision threatens hundreds of longstanding memorials across the country" is alarmist in the extreme. (Pet.11). The Fourth Circuit made clear, "our decision is confined to the unique facts at hand." (Pet.App.26a). The decision was based on *this Cross's* "size, history, and context." (Pet.App.25a-28a). The court emphasized its ruling does *not* "jeopardize other memorials across the Nation," including the Arlington Cemetery crosses. (Pet.App.26a-27a). Neither of the Arlington "crosses is a prominent or predominant feature of the cemetery," *Trunk*, 629 F.3d at 1114, 1124, whereas here, "Christianity is singularly—and overwhelmingly—represented." (Pet.App.27a).

The Holocaust monument in South Carolina, surrounded by similar-sized monuments, is *not* "almost surely forbidden" either. (Pet.19). The Star of David, which appears on the Israeli flag, is a symbol for Israel and Judaism. It was used by the Nazis to identify Jews during the Holocaust, and therefore has a distinct non-religious meaning in this context.

D. There is no conflict with any Supreme Court decision.

1. *Van Orden*

The Legion argues that the Cross "is materially indistinguishable from the monument in *Van Orden*."

(Pet.27). This 40-foot-tall Christian cross, however, is immensely distinguishable from the six-foot-tall Ten Commandments display in *Van Orden* in three ways.

First, the Latin cross does not have a dual "secular meaning" that can readily "be divorced from its religious significance." *Duncan*, 616 F.3d at 1162. In *Van Orden*, the plurality found that "the Ten Commandments have an undeniable historical meaning" tied to the foundations of lawmaking. 545 U.S. at 688-90. Justice Breyer agreed. *Id.* at 701-02 (concurring). He then concluded that because the monument was a small component of a large foundations of law display on state capitol grounds, and there was no evidence of any religious motivation from the private donor, the "non-religious aspects of the tablets' message [] predominate[d]." *Id.*

The Fourth Circuit correctly found that the Latin cross has no secular "connection" to our "Nation's history and government." (Pet.App.15a). The Circuits agree that the cross "does not possess an ancillary meaning as a secular or non-sectarian war memorial." *Trunk*, 629 F.3d at 1116, 1120. The Latin cross is instead an "exclusively religious symbol." *King v. Richmond County*, 331 F.3d 1271, 1285 (11th Cir. 2003). In *Allegheny*, this Court distinguished "a specifically Christian symbol" such as a cross or crèche from "more general religious references" found in our Nation's history. 492 U.S. at 603, 606-07.

Second, Bladensburg Cross stands "four stories tall, and [is] overshadowing the other monuments" in

the area. (Pet.App.22a). In *Van Orden*, the 6-foot-tall slab was added to an existing array consisting of "17 monuments" of similar size "and 21 historical markers." 545 U.S. at 681, 701.

Third, Bladensburg Cross "is not only a preeminent symbol of Christianity, it has been consistently used in a sectarian manner." *Trunk*, 629 F.3d at 1124. (Pet.App.4a-5a). In *Van Orden*, Justice Breyer observed that the Ten Commandments had never been used for "mediation" or "religious activity." 545 U.S. at 701-02. By contrast, in *McCreary County v. ACLU*, this Court found a Ten Commandments display unconstitutional largely because, at the dedication ceremony, "the county executive was accompanied by his pastor, who testified to the certainty of the existence of God." 545 U.S. 844, 869 (2005). The Court concluded that the "reasonable observer could only think that the Counties meant to emphasize and celebrate the Commandments' religious message." *Id.*

As in *McCreary*, a state official delivered the keynote address at the Cross's dedication, pronouncing it to be "symbolic of Calvary," and was accompanied by Christian clergy who delivered prayers.[80] Government and Christian clergy aligned again for prayer at the Cross's fiftieth anniversary[81] and rededication ceremonies.[82]

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[80] (Pet.App.56a)(J.A.1130-34)(J.A.2508).

[81] (J.A.1262-70)(J.A.1998).

[82] (J.A.137-38)(J.A.362-65)(J.A.375).

The Legion nonetheless insists that *Van Orden* is indistinguishable, asserting that the "Memorial's 'context'" and the "'*circumstances surrounding* the [Commission's ownership of the Memorial]'" suggests that "'the State itself intended the . . . nonreligious aspects of the [Memorial's] message to predominate'" because "the Commission's involvement with the Memorial is due only to roadway expansion plans and concerns of traffic safety." (Pet.27). This is both factually incorrect *supra*, and belied by the keynote speech and the Commission's inclusion of a Catholic priest at the rededication. More importantly, there is no "nonreligious commemorative" message conveyed by a Christian cross.

The Legion adds that "almost *90* years passed before the first complaint." (Pet.28). But Justice Breyer only considered the lack of legal challenges relevant to a "borderline" case involving a small dual-meaning display. 545 U.S. at 700-03. And even then, this evidence was only relevant because there was no religious usage of the monument, no religious motive on the part of the private donor, and no indication that the delay was "due to a climate of intimidation," *Id.* Conversely, this "Calvary" cross was religiously motivated, has consistently been used for prayer activities, and as the Fourth Circuit found, a climate of intimidation explains the lack of prior legal challenges.[83]

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[83] (Pet.App.20a-21a); *e.g.* (J.A.211-15)(J.A.1388-93)(J.A.1404)(J.A.1414)(J.A.1427-31).

2. *Buono*

The Legion's extensive reliance on *Buono* is misplaced. (Pet.2, 6, 13-14, 29, 33). *Buono* did not address an Establishment Clause challenge, but simply a later procedural issue. 559 U.S. at 706 ("The Court is asked to consider a challenge, not to the first placement of the cross . . . but to a statute that would transfer the cross . . . to a private party."). The plurality held that the court improperly modified the injunction without a hearing as to the transfer. *Id.* at 721-22. Two other justices concurred in the remand on standing grounds. *Id.* at 729-30 (Scalia, J., concurring). Justice Kennedy stressed that the case was particularly ill suited for "sweeping pronouncements" and "categorical rules." *Id.* at 722.

Nothing in *Buono* contradicts the Fourth Circuit's conclusion that the cross "only holds value as a symbol of death and resurrection *because* of its affiliation with the crucifixion of Jesus Christ." (Pet.App.18a). The "thousands of small crosses" referenced by Justice Kennedy "serve as individual memorials to the lives of the Christian soldiers whose graves they mark." *Trunk*, 629 F.3d at 1116 n.18 (citing *Buono*). Justice Alito recognized that the cross is not a secular symbol, as it excludes Jewish soldiers whose graves are marked by a Star of David. 559 U.S. at 726 (concurring). *See also id.* at 747 (Steven, J., dissenting) ("no participant in this litigation denies that the cross bears that [sectarian] meaning").

Both the Ninth and Tenth Circuits determined, after due consideration of *Buono* and a more thorough review of crosses in memorials, that the Latin cross "remains a Christian symbol, not a military symbol." *Trunk*, 629 F.3d at 1113-14, 1116, n.18; *Duncan*, 616 F.3d at 1152 n.5, 1161.

Moreover, the cross in *Buono* was "less than eight feet tall" and in the middle of the desert. 559 U.S. at 707. As Justice Alito noted, it "was seen by more rattlesnakes than humans." *Id.* at 725 (concurring). According to Justice Alito, the fact that the cross was placed in the desert, *without approval* by the government, and went "largely unnoticed for many years," made it far less likely to be perceived as a government endorsement of religion. *Id.* at 724-25. The situation would be different, he noted, if a cross was displayed as "an official World War I memorial on the National Mall." *Id.* at 728.

In contrast to the small "cross in the desert," Bladensburg Cross stands 40-feet tall in a heavily-trafficked highway median, evoking "a message of aggrandizement and universalization of religion, and not the message of individual memorialization and remembrance that is presented by a field of gravestones." *Trunk*, 629 F.3d at 1116 n.18. (Pet.App.22a). "No viewer could reasonably think that it occupies this location without the support and approval of the government." *Allegheny*, 492 U.S. at 600.

Finally, Justice Alito emphasized that "the new owner is under no obligation to preserve the monument's

present design." 559 U.S. at 728 (concurring). With this knowledge, a reasonable observer would "appreciate that the transfer represents an effort by Congress to address a unique situation and to find a solution that best accommodates conflicting concerns." *Id.*

3. *Town of Greece*

The Legion argues that "The Memorial Is Constitutional Under The Test Applied In *Town of Greece*." (Pet.32).[84] But there is no "test" in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). As Justice Alito summarized: "All that the Court does today is to allow a town to follow a practice that we have previously held is permissible for Congress and state legislatures." *Id.* at 1834 (concurring). The Court simply determined whether Greece's practice fit within the legislative prayer tradition upheld in *Marsh v. Chambers*, 463 U.S. 783 (1983). *Id.* at 1819, 1825. Consequently, *Town of Greece* is unhelpful outside the legislative prayer context. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 80 (1985) (O'Connor, J., concurring). Indeed, this Court has consistently refused to extend *Marsh* to religious display cases. *See McCreary*, 545 U.S. at 860 n.10; *Allegheny*, 492 U.S. at 603, 604 n.53, *Lynch*, 465 U.S. at 683.

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[84] This argument was not briefed in the Fourth Circuit (Doc. 34).

Three independent rationales justify the constitutionality of legislative prayer, not one of which is present here, *infra*.

First, the "*specific practice*" was "accepted by the Framers" days after approving the First Amendment *and* "withstood the critical scrutiny of time and political change." *Town of Greece*, 134 S. Ct. at 1819. The Court has always viewed "actions taken by the First Congress a[s] presumptively consistent with the Bill of Rights." *Id.* at 1834 (Alito, J., concurring). By contrast, there "is a complete lack of evidence that our founding fathers were aware of the practice of placing crosses" on federal land, much less traffic islands. *Eckels*, 589 F. Supp. at 237. *See also Glassroth v. Moore*, 335 F.3d 1282, 1298 (11th Cir. 2003) (finding *Marsh* inapposite because "there is no evidence of an 'unambiguous and unbroken history' of displaying religious symbols in judicial buildings").

The Legion cites *Buono* to support its argument that "history supports the accepted use of crosses in passive war memorials to commemorate the fallen" (Pet.32), but there is no evidence in *Buono* or on this record "that the cross has been universally embraced as a marker for the burial sites of non-Christians or as a memorial for a non-Christian's death." *Duncan*, 616 F.3d at 1161. "[W]hile the image of row upon row of small white crosses amongst the poppies remains an exceedingly powerful one," the "cross was a marker of an individual grave, not a universal monument to the war dead." *Trunk*, 629 F.3d at 1112-13. The Legion refers to "114 Civil War memorials *incorporating* crosses"

(Pet.33) (emphasis added), but there are at least 3,500 Civil War monuments and only a mere "114 include some kind of cross," and even then, the cross is *subordinated* to secular symbols. *Id.*

Marsh's second rationale rests on the understanding that legislative prayer is an "internal act" intended "to accommodate the spiritual needs of lawmakers." *Town of Greece*, 134 S. Ct. at 1825-26. Legislative prayer falls outside *Marsh*'s tradition if it promotes "religious observance among the public." *Id.* A monolithic and unavoidable Christian cross dominating a county's busiest intersection is manifestly not an "internal act."

Marsh's third rationale is the recognition that legislative prayer is ecumenical; "no faith was excluded . . . nor any favored." *Id.* at 1819. *Town of Greece* stressed the importance of "nondiscrimination" and upheld Greece's practice because a "minister or layperson of any persuasion, *including an atheist*, could give the invocation." *Id.* at 1816, 1824 (emphasis added). An enormous Christian cross memorial is not a "benign" acknowledgment of religion but a potent Christian symbol that "discriminat[es] against the beliefs of patriotic soldiers who [are not] Christian." *Allegheny*, 492 U.S. at 615 n.61 (citing *Eckels*, 589 F. Supp. 222).

E. The Legion seeks to upend decades of settled jurisprudence for a "*per se*" rule that flouts vital Establishment Clause precepts.

The true reason the Legion is seeking certiorari is not because there is a Circuit split or a misapplication of precedent, but because it is unhappy with existing law. The Legion asks this Court to overturn decades of Establishment Clause jurisprudence in favor of a *per se* "rule" that upholds all sectarian displays so long as the *government*'s *purpose* is not to "coerce or convert." (Pet.34-35). Specifically, the Legion wants

> a simple rule for constitutional challenges to passive displays: when a government uses religious imagery in a way that is consistent with "the rich American tradition of religious acknowledgments," *Van Orden*, 545 U.S. at 690 (plurality opinion), the display will be presumptively valid unless it is shown that the government was not reflecting this tradition but was exploiting it to coerce or convert nonadherents.

(Pet.34-35).

At the outset, there is no "rich American tradition" of displaying massive Latin crosses on government property, *supra*. *Van Orden* only discussed acknowledgments to Ten Commandments and other ecumenical proclamations. 545 U.S. at 686-90 (plurality). It said nothing about crosses. There is no support for this "rule" in *Town of Greece* either. Rather, the Court emphasized that "*Marsh* must not be understood as

permitting a practice that would amount to a constitutional violation if not for its historical foundation." 134 S. Ct. at 1819.

The Legion's "rule" is far more extreme than the proposed rule this Court rejected in *Allegheny*, *viz.*, that displaying "religious symbols does not violate the Establishment Clause unless they are shown to be 'coercive.'" 492 U.S. at 597 n.47. The Legion's rule only invalidates displays that have a government *purpose* to coerce or convert.

Any Establishment Clause rule or test "must reflect and remain faithful to the underlying purposes of the Clauses, and it must take account of *context and consequences* measured in light of those purposes." *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring) (emphasis added). The Legion's rudderless approach does neither. It cuts context and consequences completely from the inquiry. Despite divergence at the bottom line, the Court has agreed "upon the relevant constitutional principles: the government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends upon its context." *Allegheny*, 492 U.S. at 597. *See Buono*, 559 U.S. at 721 (plurality) (reiterating the importance of "context" and "consequences").

The "'Establishment Clause forbids a State to . . . remain studiously oblivious to the effects of its actions.'" *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 307-08, n.21 (2000) (citation omitted).

And the "cross dramatically conveys a message of governmental support for Christianity, whatever the intentions of those responsible for the display may be." *St. Charles*, 794 F.2d at 271. Moreover, "[w]hen the power, prestige, and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engel v. Vitale*, 370 U.S. 421, 430-31 (1962). In *Allegheny*, Justice Kennedy explicitly recognized the coercive effect of "the permanent erection of a large Latin cross on the roof of city hall." 492 U.S. at 661 (Kennedy, J., concurring and dissenting in part).

The *Lemon* test, although criticized, merely enshrined unquestioned bedrocks of Establishment Clause jurisprudence into a formal test. *See Wallace*, 472 U.S. at 55-56; *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). For instance, in *School District of Abington Township v. Schempp*, the Court announced: "[W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution." 374 U.S. 203, 222 (1963).

And despite its criticism, *Lemon*'s context-driven approach has produced consistent results in display cases and does not require "eradication of all religious symbols in the public realm." *Buono*, 559 U.S. at 718. It upholds displays that are more secular than sectarian. *E.g.*, *Allegheny*, 492 U.S. at 616-17 (menorah); *Lynch*, 465 U.S. at 671 (crèche). Even in *Van Orden*,

Justice Breyer ultimately used *Lemon* to uphold the Ten Commandments. 545 U.S. at 701-02 (finding "this monument conveys a predominantly secular message"); *id.* at 703-04. The plurality also found the message and purpose to be more secular than sectarian. *Id.* at 686, 691 n.11. *Lemon* only renders unconstitutional those displays that transgress the "wholesome 'neutrality'" at the heart of the Establishment Clause. *Schempp*, 374 U.S. at 222. *E.g.*, *McCreary*, 545 U.S. at 881; *Allegheny*, 492 U.S. at 598-99; *Stone v. Graham*, 449 U.S. 39, 42-43 (1980).

The "principle of neutrality has provided a good sense of direction: the government may not favor one religion over another, or religion over irreligion." *McCreary*, 545 U.S. at 875-76. The principle has been helpful "because it responds to one of the major concerns that prompted adoption of the Religion Clauses." *Id.* The Framers understood that "nothing does a better job of roiling society" than when "the government weighs in on one side of religious debate." *Id.*

"The lessons of the First Amendment are as urgent in the modern world as in the 18th century when it was written." *Lee*, 505 U.S. at 591-92. As Justice Kennedy recognized in *Lee*, "what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce." *Id.* "At a time when we see around the world the violent consequences of the assumption of religious authority by government," the Court must ask, "[w]hy would we trade a system that has served us so well for one that has served others so

poorly?" *McCreary*, 545 U.S. at 882 (O'Connor, J., concurring).

CONCLUSION

Because the petition comes to this Court at an interlocutory stage, and the district court has wide discretion to fashion a remedy that accommodates conflicting concerns, this case is not ripe for this Court's review. Nor is there any conflict between the Circuits or with this Court's precedents.

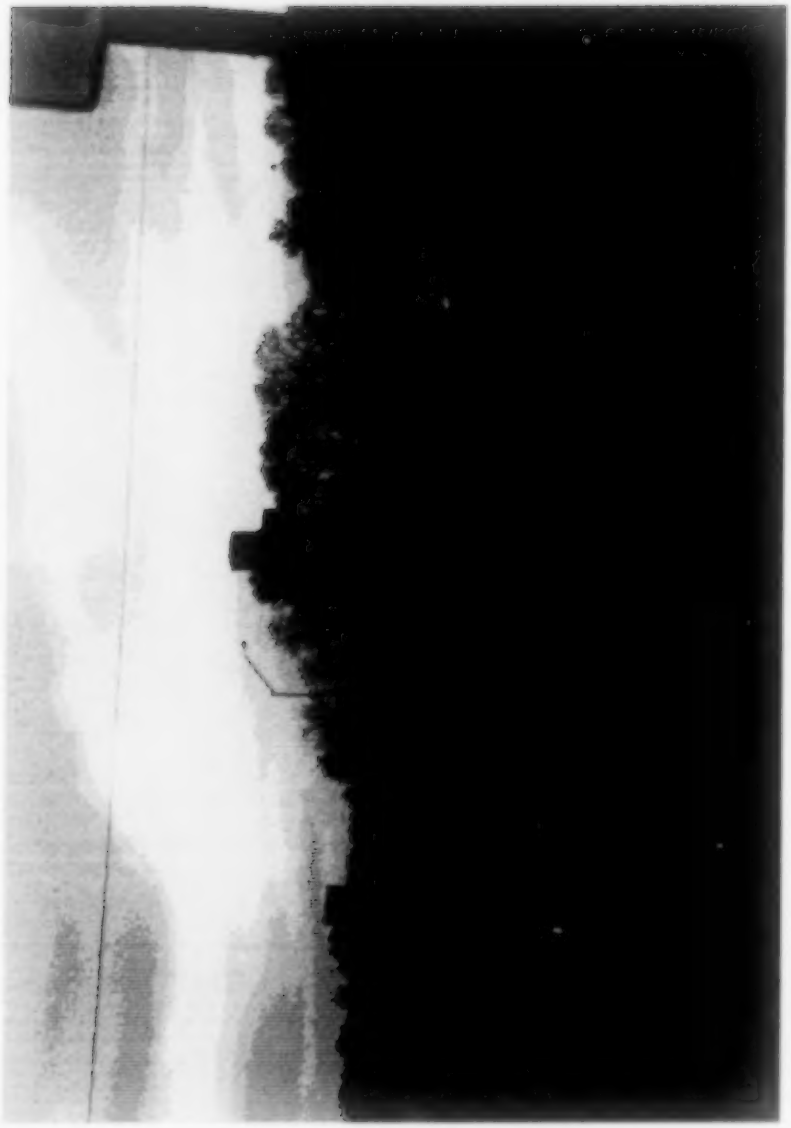
The petition for writ of certiorari should be denied.

Respectfully submitted,

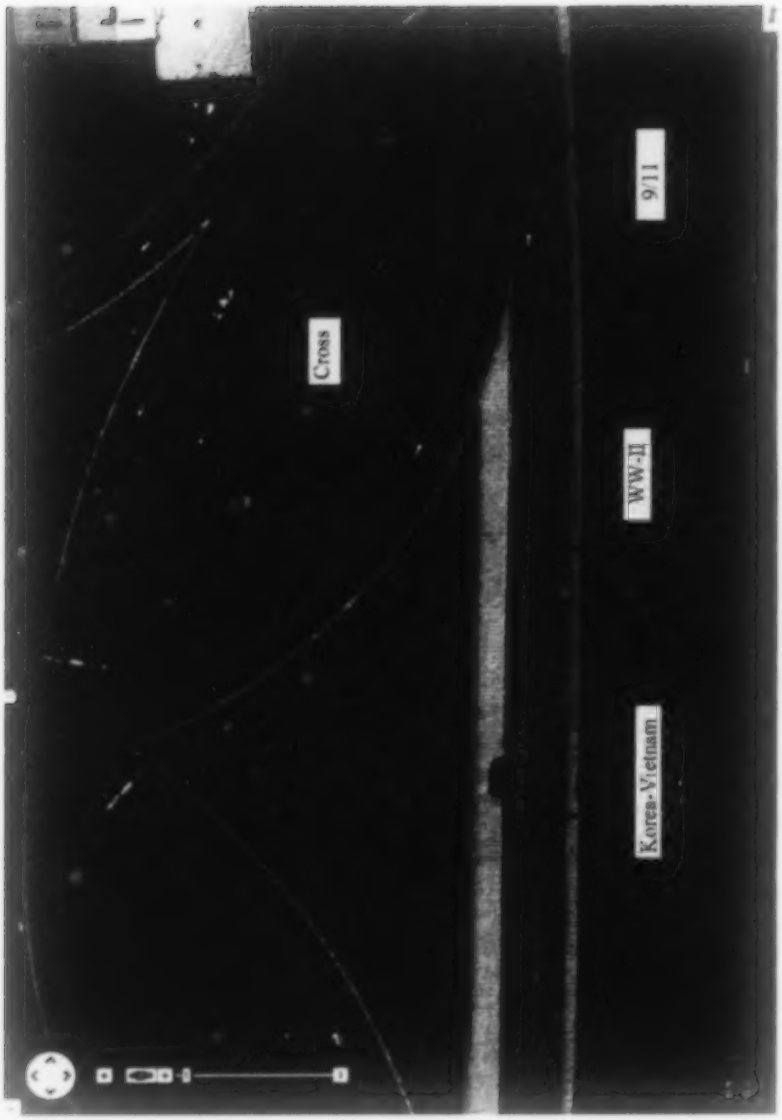
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